United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1158

To be argued by
JOHN TIMBERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1158

UNITED STATES OF AMERICA,
Appellee,

—v.—

PHILIP LUBRANO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—v.—

PHILIP LUBRANO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Philip Lubrano appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 27, 1975, after a six-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 74 Cr. 577, filed June 6, 1974, charged in Count One that Lubrano and co-defendants Anthony Rizzo and Victor Vitale conspired to distribute narcotics in violation of Title 21, United States Code, Section 846. Count Two charged that Vitale distributed approximately 102 grams of cocaine on May 11, 1973 in violation of Title 21, United States Code, Section 841, and Count Three charged that Lubrano distributed approximately 112.2 grams of cocaine on August 20, 1973.

The trial commenced on January 8, 1975. On January 17, 1975 the jury found Vitale guilty on Counts One and

Two, as charged. Rizzo was found guilty on Count One, as charged, and Lubrano was found guilty on Count One, the conspiracy count, but not guilty on Count Three, the substantive count.

On March 27, 1975 Judge Motley sentenced Lubrano to five years imprisonment and three years special parole. Vitale was sentenced to concurrent five-year terms of imprisonment, execution suspended, and was placed on probation for concurrent five-year terms. Judge Motley sentenced Rizzo to a three-year term of imprisonment to run concurrently with a jail term that Rizzo is presently serving. Rizzo was also sentenced to six years special parole.

Lubrano is presently enlarged on bail pending this appeal.

Statement of Facts

A. The Government's Case

At trial the Government proved that during the period from May to October, 1973, Lubrano conspired with his co-defendants, Vitale and Rizzo, to sell more than a pound of cocaine for $14,000 in four transactions, all but one of which occurred, in whole or in part, at or near Lubrano's jewelry store, Kat Vin Jewelry, on the upper East Side of Manhattan. The Government's proof included testimony by surveillance agents, tape recordings and video tapes. The murder of Tony Finn, the confidential informant who dealt directly with Lubrano during the transactions, forced the Government to rely on circumstantial evidence to prove Lubrano's participation in the conspiracy.

On the evening of May 1, 1973 Rizzo met Tony Finn and went to Block's Bar on the lower East Side. Rizzo and Finn remained at Block's Bar for two or three hours

until Vitale arrived, immediately after which Rizzo, Vitale and Finn adjourned to Rizzo's nearby Jewelry store where circumstantial evidence showed that Vitale sold Finn an ounce of cocaine for $800. Afterwards, Vitale, Rizzo and Finn discussed arrangements for future narcotics deals outside the jewelry store.* (Tr. 87-103, 114-132, 185-217, 651-656, 724-730, and 733-759)

On May 10th, Finn parked a car, with $3,500 official Government funds locked in the trunk, near Vitale's lower East Side store, East Side Jewelry Exchange. Finn took the car keys to East Side Jewelry, where he and Vitale had a conversation about where the car was parked and how Vitale could get in touch with Finn. During this conversation ** Vitale said that he would go "uptown" to get the cocaine.

That evening Vitale went to Finn's car, opened the trunk, removed the $3,500, and headed uptown in his own car. Agents who were surveilling Vitale lost contact and did not see where he went. However, the transaction was not completed that evening.

The next day, May 11, agents were placed on surveillance outside Lubrano's jewelry store, Kat Vin Jewelry. At about 5:30 p.m. other agents on surveillance near Vitale's jewelry store saw Vitale drive north. Shortly afterwards Vitale was observed entering Kat Vin Jewelry. Vitale left Kat Vin several times, going to a telephone in the nearby Gion Bar, and returning to Kat Vin each time. Then Vitale left the area. At about 7:00 p.m.—an hour and a half after Vitale left East Side Jewelry to drive "uptown" (and after Vitale had left Kat Vin

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* A tape recording of this conversation was introduced into evidence. (Tr. 190; GX 6) "Tr." followed by a number refers to page in the transcript of the trial. "GX" followed by a number refers to a Government exhibit.

** A recording of this conversation was received in evidence. (Tr. 228; GX 8).

Jewelry)—an unidentified male placed a bag of cocaine in the trunk of Finn's car, locked the trunk, and went inside East Side Jewelry. (Tr. 219-253, 288-290, 294-307, 312, 468-480, 481-488, 491-496, 519-525, 527-553, 569-570, 584-588, 617-619, 639-641, 688-701, and 712-717)

On August 20, 1973 Drug Enforcement agents searched Finn and found no narcotics. They gave Finn $3,750 official Government funds. The agents kept Finn under constant surveillance as Finn drove to and entered the Gion Bar, which was located near Kat Vin Jewelry. Inside the Gion Bar, Finn spoke to co-defendant Rizzo. Rizzo (or a male who was with Rizzo) momentarily left the bar and went to another part of the establishment, after which Lubrano was observed leaving a nearby building and entering the Gion Bar. Rizzo introduced Lubrano to Finn. After Lubrano and Finn had talked for a few minutes, they left the bar and went around the corner to the Gaiety East Restaurant. Agents who kept Finn under constant surveillance testified that they had not seen Finn dispose of the money or receive narcotics up to this point.

Nobody saw what happened inside the Gaiety East Restaurant. Lubrano and Finn entered together. They remained inside for a few minutes and left separately. When Finn left, surveillance agents observed a large bulge in his left-front trouser pocket which they had not seen when Finn entered. Finn entered his car and drove to a previously-agreed-upon location, where a search by agents disclosed that he no longer had the money but that he did have a package that contained approximately 112 grams of cocaine. Agents who kept Finn under constant surveillance testified that they did not see Finn dispose of the money or receive narcotics during the time he traveled from the Gaiety East to the agreed-upon location. (Tr. 260-272, 488-491, 496-516, 525-527, 553-569, 588-591, 619-625, 701-704, and 733-735).

The fourth and final sale took place in an apartment building at 141 East 56th Street in Manhattan—again located near Lubrano's Kat Vin Jewelry. On October 4, 1973 Lubrano entered the apartment building at 141 East 56th Street—followed a minute or two later by Finn. There was no testimony, about what happened inside. However, after about 15 minutes Finn left the building and met with Special Agent Michael Peterson, of the Drug Enforcement Administration. After a conversation between Finn and Agent Peterson, Finn was searched for narcotics with negative results, given $6,400, and told to purchase ¼ kilogram of cocaine. Finn re-entered the apartment building. Again, there was no testimony about what happened inside. However, when Finn left the building 15 minutes later he was carrying a large foil-covered cylinder that contained cocaine. When agents searched Finn they found that he no longer had the $6,400. (Tr. 272-282)

B. The Defense Case

Philip Parker, a diamond setter whose place of business was across the street from Vitale's East Side Jewelry Exchange, pointed out an error in a blackboard diagram of lower East Side streets that several agents had used during their testimony. (Tr. 829-834)

ARGUMENT

POINT I

There was more than sufficient evidence to support the jury's verdict that Lubrano conspired to distribute cocaine.

Lubrano's first claim of error is that the Government did not present sufficient evidence to support the jury's verdict against him. Although Tony Finn's sudden death forced the Government to rely on circumstantial evidence to prove Lubrano's participation in the conspiracy, the evidence, particularly when viewed in the light most favorable to the Government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), is more than sufficient to support the jury's verdict.

Lubrano asserts that the Government's proof established no more than that Lubrano was associated with the co-conspirators (Appellant's Brief at 17-19). This assertion is incorrect, and the supporting cases cited by Lubrano are inapposite.

The applicable law is succintly stated by Judge Mansfield in *United States* v. *Wisniewski*, 478 F.2d 274, 279 (2d Cir. 1973):

> "While mere coincidental presence at the scene of a crime is insufficient to establish participation . . . 'evidence of an act of relatively slight moment may warrant a jury finding participation in a crime . . . .' In addition '[t]he trier is entitled, in fact bound to consider the evidence as a whole, and, in law as in life, the effect of this generally is much greater than the sum of the parts.'" (citations omitted)

Accord, United States v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

In this case evidence was introduced that parts of three of the four cocaine transactions in question occurred at, or near, Lubrano's jewelry store, Kat Vin Jewelers.*

The evidence concerning the May 11, 1973 transaction strongly suggested that Vitale obtained cocaine at Kat Vin during Vitale's visit there, shortly before the cocaine was placed in the trunk of Tony Finn's car. Thus, the jury was entitled to conclude that Vitale obtained the cocaine during his one and a half hour trip "uptown" just before the cocaine was delivered. Given the relatively short time Vitale was "uptown" during evening rush hour, it would have been difficult for him to have stopped to pick up the cocaine at any place other than Kat Vin.

Second, Lubrano's participation in the August 20, 1973 cocaine sale in the Gaiety East Restaurant, which was also located near Kat Vin, involved substantially more than "mere association" with the conspirators. The evidence warranted a jury finding that, when Finn met with Rizzo at the Gion, Lubrano was waiting in a nearby building with the package of cocaine; Rizzo (or the male who was with him) telephoned Lubrano to notify him of Finn's arrival with the purchase money; Lubrano, hearing that Finn had arrived, carried the package of cocaine to the Gion where Finn and Lubrano decided to complete the sale in the Gaiety East Restaurant; and that it was Lubrano—the person who went to, and remained in, the

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* In addition to the three transactions that occurred at or near Kat Vin Jewelers, Rizzo met Finn in the vicinity of Kat Vin on April 12, 1975 (Tr. 86, 649-650).

Gaiety East Restaurant with Finn—who delivered the package of cocaine to Finn.*

Third, although there was no direct evidence showing from whom Finn purchased cocaine on October 4, 1973 inside the apartment building at 141 East 56th Street, there was sufficient circumstantial evidence to support the jury's conclusion that it was Lubrano who sold this cocaine. Finn made two trips into the apartment building—the first apparently to make arrangements and the second to exchange money for cocaine. There was evidence that Lubrano entered the building a minute or two before Finn walked in the first time; the apartment building was located near Kat Vin Jewelers; and the sale was of a large amou[illegible] of cocaine—like the May 11 and August 20 transactions in which Lubrano was involved.

The cases cited in Lubrano's brief do not support his position that this evidence was insufficient to support the jury's verdict against him. In fact, two of the cases, *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 967 and 375 U.S. 974 (1964) and *United States* v. *Calabro*, 449 F.2d 885, 889-891 (1971),

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* Lubrano argues that the jury's verdict of not guilty on Count Three (which charged that Lubrano distributed cocaine on August 20) "underscores" his position that the August 20 evidence was insufficient to show that Lubrano conspired to distribute cocaine. This argument flies in the face of the pertinent law. The Supreme Court and this Court have consistently held that an acquittal on one count of an indictment does not affect a simultaneous conviction on another count, even when the evidence for both counts is the same. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Carbone*, 378 F.2d 420, 422 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, — U.S. — (1975).

cert. denied, 405 U.S. 928 (1972),* in which the Government's evidence was held to be sufficient to support guilty verdicts, support the Government's position. The other cases cited by Lubrano are distinguishable because the defendants in question in those cases were not involved in several narcotics transactions, as was Lubrano, or those defendants were merely associated with wrongdoers, and did not assume the active role that Lubrano did, particularly on August 20. In fact, an overwhelming number of recent decisions of this Court supports Judge Motley's ruling that the Government's evidence in this case was sufficient to support the jury's verdict. *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1207-1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974): *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973): *United States* v. *Wisniewski*, *supra*, 478 F.2d at 279-280: *United States* v. *Marrapese*, *supra*; *United States* v. *Barrera*, 486 F.2d 333, 335-337 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974) (see proof as to defendant Enriquez): *United States* v. *Christophe*, 470 F.2d 865 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972) (see proof as to defendant Panica): *United States* v. *D'Amato*, 493 F.2d 359, 360-365 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

The facts in two of these cases deserve brief mention.

In *United States* v. *Wisniewski*, *supra*, stolen cars were taken to what appeared to be a combination used car lot and junk yard. There the cars were dismantled for the apparent purpose of selling the resulting parts. The

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* The question decided by the Court in *Calabro*, as well as in *United States* v. *Ruiz*, *infra*, was whether a fair preponderance of the non-hearsay evidence showed that the defendant associated himself with the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969). However, both convictions were affirmed without any suggestion that the Government's evidence was not sufficient to support the conviction.

only proof against defendant Cavallaro was that agents watching the junk yard saw Cavallaro on two occasions: once, walking back and forth between two buildings at a time when a partially dismantled stolen car was in the yard and, on another occasion, standing next to a partially dismantled car.

In *United States* v. *Ruiz*, *supra*, immediately before co-defendant Torres sold a package of cocaine to an undercover agent, Torres spotted defendant Ruiz; said, "That's my man. He's got the package"; and entered an apartment building with Ruiz. Two weeks later a similar pattern of events occurred in connection with a second heroin sale by Torres to the agent. When Torres was arrested he was carrying a piece of paper bearing Ruiz's nickname and a telephone number similar to that of Ruiz. This Court held that the foregoing evidence was sufficient to support a jury finding that Ruiz had conspired to distribute narcotics.

Under the standards followed by the Second Circuit in these cases the evidence in this case was more than sufficient to support the jury's verdict that Lubrano was a member of the conspiracy.*

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* Lubrano also argues in the first section of his brief that Judge Motley erred in admitting into evidence against Lubrano the May 10, 1973 recording of Vitale telling Finn that Vitale would obtain the cocaine "uptown". Lubrano claims that this recorded statement is hearsay evidence that should not have been admitted against Lubrano because there was insufficient non-hearsay evidence establishing Lubrano's participation in the conspiracy.

First, the quantum of non-hearsay evidence of Lubrano's participation in the conspiracy is not controlling on this question because the recording is admissible under the entirely distinct hearsay exception for statements of intention offered to show that the declarant probably performed the intended act as planned. *Mutual Life Ins. Co. of New York* v. *Hillman*, 145 U.S. 285, 295

[Footnote continued on following page]

POINT II

All of Agent Peterson's testimony was properly received in evidence and did not constitute inadmissible hearsay.

Lubrano claims that the trial court erred in admitting into evidence several aspects of Agent Peterson's testimony because, taken together, these portions of Peterson's testimony permitted the jury to infer what Tony Finn said about Lubrano during hearsay conversations with Agent Peterson. The argument has no merit. All of the challenged testimony was admissible into evidence, mostly as proof of relevant background events leading up to the cocaine sales in question.

Most of the testimony to which Lubrano objects concerns instructions that Agent Peterson gave Finn while Finn was being searched and given money with which to purchase narcotics. Evidence that Finn was searched and given money and instructions was properly introduced into evidence to assist the jury's understanding of the ensuing narcotics transactions. It is well-established that proof of relevant conversations is admissible, even where the conversations constitute hearsay, when the conversations are relevant to show events leading up to the crime in question. *United States* v. *Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v.

(1892); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Tramunti*, 513 F.2d 1087, 1109 (2d Cir. 1975); VI Wigmore, Evidence § 1725 (3d ed. 1940). But in any event the evidence already discussed in this section—exclusive of the recording of Vitale's "uptown" comment—was sufficient to show by "a fair preponderance of the evidence independent of the hearsay utterances" that Lubrano associated himself with the conspiracy. *United States* v. *Ruiz*, *supra*; *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969).

Manfredonia, 414 F.2d 760, 765 (2d Cir. 1969).* Here, Agent Peterson's instructions were not offered for the truth of what Agent Peterson said, but to establish the events leading up to the cocaine sales.

It should also be noted that frequent and fully stated objections by Lubrano's counsel in front of the jury (*e.g.*, Tr. 260, 264, 273, 275), alerted the jury that Peterson's instructions were not being offered for their truth. Also, Agent Peterson testified in court and was available for cross-examination by Lubrano's counsel. Finally, if the defendants had requested a charge to the jury that Agent Peterson's instructions to Finn were not to be taken as evidence that the defendants sold cocaine, such a charge undoubtedly would have been given. *See United States* v. *Manfredonia, supra*, 414 F.2d at 765.**

By careful selection and omission (without indication that important trial transcript passages have been left out) Lubrano's brief seeks to convey the impression that the Government employed a devious and "subtle" predetermined plan" to "insinuate" into evidence hearsay statements made by Tony Finn about Lubrano. Any such impression that may be created is incorrect and caused by the selective quotation in appellant's brief. An example of this misleading editing occurs in the first Peterson to Finn instruction that is quoted in this section of

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* The proof of Agent Peterson's instructions to Finn was also admissible as non-hearsay evidence on the independent ground that it was a verbal act. *United States* v. *Wiley*, Dkt. No. 75-1082 (2d Cir. July 29, 1975), slip op. at 5215; *United States* v. *D'Amato, supra*, 493 F.2d at 363-364.

** Moreover, if Agent Peterson's statement was inadmissible because it was hearsay, in the context of the entire record its admission was harmless error. *United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975).

Lubrano's brief (Appellant's Brief at 23-24).* A reading of the full trial transcript at pages 124-131 discloses that—far from being cleverly contrived by the prosecutor—the quoted questions were asked in the course of, and in connection with points raised during, argument by counsel about admission of a cocaine exhibit. The first question ("Agent Finn, what was the purpose . . ." etc.) was not carefully contrived by the prosecutor, but was only asked by the prosecutor at the trial judge's behest after the judge had posed the question herself in the jury's presence. The next question ("Who was he to purchase that from?") was never answered, although Lubrano's brief purports to show an immediate answer. In fact, the answer shown in Lubrano's brief is to a different question posed (at Tr. 130) more than a page later. Finally, Lubrano's brief conveys the impression that Peterson's answer was taken "subject to connection against Lubrano". In fact, Judge Motley's "subject to connection" comment refers to the cocaine exhibit concerning whose admission all the quoted questions and answers were given.**

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* The quotation, as edited and set forth in Lubrano's brief, is as follows:

> "Q. Agent Peterson, what was the purpose of giving Mr. Finn $800 on the night of May 1, 1973?
>
> "A. Mr. Finn was to purchase one ounce of cocaine for a price of $800.
>
> "Q. Who was he to purchase that from?
>
> "A. I told Mr. Finn to meet with Mr. Rizzo at the determined spot and Mr. Rizzo's connection, which was understood there would be one, and purchase one ounce of cocaine for $800.00. (Tr. 129-131 and 24-25 A)
>
> * * * * *
>
> "The Court: We will take that subject to connection as against Lubrano. . . ."

** Like the passage discussed in the next material has been omitted without indication from trial transcript passages quoted at the following pages of Lubrano's brief: 26 (the full passage is set forth at Tr. 265-266); 27 (full passage at Tr. 270), 32 (full passage at Tr. 279-281); and 35 (full passage at Tr. 436).

This section of Lubrano's brief also attacks two questions the prosecutor asked on redirect examination of Agent Peterson.

The first question was, "Did anybody tell you that Lubrano had given Finn drugs in the Gaiety East Restaurant?" An objection to the question was sustained and it was never answered. In passing, it should be noted that the prosecutor was justified in asking the question because on cross-examination Lubrano's attorney had brought out that no agent had told Agent Peterson that Lubrano had given Finn narcotics inside the Gaiety East Restaurant on August 20. Fearing that this misleading line of cross-examination might lead the jury to conclude that the Government had entrapped Lubrano on October 4 by instructing Finn to offer to purchase narcotics from Lubrano on that date when all indications were that Lubrano was not predisposed to sell narcotics, the prosecutor was entitled to ask the challenged question to establish that prior to October 4 Agent Peterson did have reason to believe that Lubrano was predisposed to sell narcotics.*

The second question—posed after Lubrano's attorney received an affirmative response to his cross-examination question, "the only cocaine you can attribute to Mr. Lu-

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* Another example of misleading editing of the trial transcript occurs in the Lubrano brief's discussion of this challenged question (Appellant's Brief at 35-38). The portion of the trial transcript that has been quoted on these pages of the Lubrano brief has been edited to make it appear that the prosecutor argued to the Court that he should be permitted to ask the challenged question because the Government's evidence was otherwise weak. In fact, the prosecutor's comments about the weight of the Government's proof were made in response to specific evidentiary inquiries by Judge Motley. These judicial inquiries are not included in the passage as quoted in Lubrano's brief. Also omitted from the quotation in Lubrano's brief are the transcript passages in which the prosecutor argued that the challenged question should be allowed in order to dispel any thoughts of entrapment the jury might be entertaining.

brano in this courtroom is the cocaine that Mr. Finn gave you" (Tr. 386)—was ". . . what cocaine that has been introduced into evidence during this trial do you attribute to the defendant Lubrano?" (Tr. 466). The challenged question was properly posed for the purpose of clarifying Agent Peterson's answer to the question asked by Lubrano's counsel on cross-examination. In any case, no harm can possibly have come from the question since Agent Peterson attributed the May 11, August 20, and October 4 packages to Finn and, as discussed in Part I of this Brief, there was substantial other evidence showing that Lubrano participated in the distribution of those three packages of cocaine.

POINT III

Testimony about transmission of the August 20 and October 4 conversations was properly received in evidence.

Lubrano contends that Judge Motley erred in permitting testimony that showed that Finn wore an electronic transmitting device when he met with Lubrano on August 20 and October 4, 1973. Judge Motley refused to admit recordings made through the device on these occasions because she found that the recordings were inaudible. Lubrano argues that he was prejudiced by testimony that Finn wore the transmitting device since the jury may have inferred that agents received transmissions on these occasions that corroborated the Government's theory of the case. The argument has no merit. Evidence that Finn was fitted with a transmitting device on August 20 was relevant and admissible to lay a foundation for anticipated subsequent testimony about what was heard by agents listening to the transmissions. The fact that Finn wore a device on October 4 was brought out by defense counsel and not by the Government.

Not surprisingly, Lubrano cites no authority in support of his novel contention that he was prejudiced by testimony indicating that Finn wore a recording device on these two occasions. In fact the testimony was relevant and admissible. Agent Peterson testified that Finn was fitted with a device on August 20 in order to lay a foundation for subsequent testimony about those transmissions that agents were able to hear through the device. Although, due to a prosecutorial oversight, agents never testified about the transmissions they received, the testimony that Finn wore a recording device was admissible to lay a foundation for this anticipated testimony and, also, to recount events leading up to the August 20 cocaine sale. *United States* v. *Ruggiero*, *supra*, 472 F.2d at 605 (2d Cir. 1973).

Testimony that the October 4 transaction was recorded was brought out by defense counsel. On redirect testimony Special Agent Paul Sennett was asked whether, and how, he contributed to preparing the reports in this case. To the prosecutor's surprise Agent Sennett's answer touched on the inaudible recording that he had made on October 4. (Tr. 570) The Court, defense counsel, and presumably the jury assumed that Agent Sennett was referring to a recording he had made of his recollection of the October 4 events, and the prosecutor dropped the subject. (Tr. 576) However, on recross-examination defense counsel asked Agent Sennett about the recording in front of the jury. Seeking to avoid any improper or prejudicial reference to the content of the recording Agent Sennett described it to defense counsel as the one that's "not been allowed in court." (Tr. 572)

POINT IV

Lubrano suffered no prejudice when Agent Fernandez obtained coffee for two jurors, at the Deputy Marshal's request.

Lubrano claims that he was improperly prejudiced when, during a trial recess, Special Agent Daniel Fernandez, who sat at the Government counsel table during trial, obtained coffee for two jurors. The District Court's denial of the defendants' motion for a mistrial was plainly correct because Agent Fernandez's action did not concern the matter pending before the jury, was harmless, and did not prejudice Lubrano and the other defendants.

The law on this point is clear.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial *about the matter pending before the jury* is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States*, 146 U.S. 140, 148-150; *Wheaton* v. *United States*, 133 F.2d 522, 527." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954) emphasis added.

A thorough airing of this incident immediately after it occurred (Tr. 253-259) made it clear that Agent Fernandez's action was harmless and was not "about the matter pending before the jury." During a trial recess the Deputy Marshal undertook to get coffee for two

jurors. Since the Deputy was already guarding a prisoner, he asked Agent Fernandez, who was participating in his first trial by sitting at Government counsel table,* to fetch the coffee. Agent Fernandez took the two jurors' orders and money to pay for the coffee, obtained the coffee, and then gave the coffee to the jurors—explaining which cups contained cream and which were black. (Tr. 254-256) When the incident was brought to the Court's attention, the Court and the prosecutor both told Agent Fernandez that communications with a juror are improper and that Agent Fernandez should never again speak to a juror during trial. (Tr. 256 and 258).

Though undesirable, this inadvertent act by an inexperienced agent, undertaken at the behest of the Marshal three days before the case went to the jury, was harmless. *United States* v. *Burke*, 496 F.2d 373, 376-378 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974); *Little* v. *United States*, 331 F.2d 287, 294-295 (8th Cir.), *cert. denied*, 379 U.S. 834 (1964). *See United States* v. *Pfingst*, 477 F.2d 177, 198-199 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). *See also United States* v. *Brasco*, 516 F.2d 816, 819 (2d Cir. 1975) and *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir.), *cert. denied*, 324 U.S. 867 (1944). The principal case Lubrano relies upon, *Pekar* v. *United States*, 315 F.2d 319 (5th Cir. 1963), concerns different and substantially more prejudicial communications. In *Pekar*, one of the grounds for reversal was that the prosecutor himself said "hello" to every juror at some time during trial and, during a recess, had a long conversation with one juror about the juror's bonding business.

In the alternative Lubrano argues that the Court should have conducted a hearing to determine whether the defendants were prejudiced by Agent Fernandez's action.

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* Agent Fernandez did not testify.

The trouble with this argument is that no defendant requested a hearing at trial. Judge Motley listened to two separate descriptions of the incident. The descriptions were essentially the same and no counsel saw fit to request a evidentiary hearing. It ill-behooves Lubrano to change course and to request a hearing now.* Fed. R. Crim. P. 51.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN TIMBERS,
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* Earlier in the trial Lubrano's attorney had declined to join other defense counsel in moving for a mistrial because he wanted to "finish this case with this jury." (Tr. 106)

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John Timbers, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Lawrence Hochheiser, Esq.
Hochheiser & Cohen
16 Court Street
Brooklyn, N. Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John Timbers

Sworn to before me this
19th day of September, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977